



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 891

[Docket No. FR-6385-F-01]

RIN 2502-AJ71

Section 202 Direct Loan Technical Amendments

AGENCY: Office of the Assistant Secretary for Housing — Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Final rule.

SUMMARY: This final rule implements technical amendments to HUD’s program regulations governing Section 202 Direct Loans for Housing for the Elderly and Persons with Disabilities (“Section 202 Direct Loan”), including the Section 202 Projects for the Elderly or Handicapped — Section 8 Assistance (“202/8”) and the Section 202 Assistance for Nonelderly Handicapped Families and Individuals —Section 162 Assistance (“202/162”) programs. The amendments are necessary to conform the Section 202 Direct Loan program regulations with HUD’s final rule implementing sections 102, 103, and 104 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA). This final rule also corrects outdated cross references in the Section 202 Direct Loan program regulations and updates the list of protected classes applicable to affirmative marketing requirements for the Section 202/8 and Section 202/162 programs.

DATES: Effective Date: January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Jennifer Lavorel, Director, Program Administration Office, Office of Asset Management and Portfolio Oversight, Office of Multifamily Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6180, Washington, DC 20410-0500, telephone number 202-402-2515 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit

SUPPLEMENTARY INFORMATION

I. Background

Enacted on July 29, 2016, HOTMA (Pub. L. 114–201, 130 Stat. 782) contains 14 sections that affect the public housing and Section 8 rental assistance programs. Sections 102, 103, and 104 of HOTMA make sweeping changes to the United States Housing Act of 1937, particularly to those sections affecting income calculations and reviews. On February 14, 2023, HUD published a final rule entitled “Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104” (88 FR 9600) (“HOTMA final rule”), which amended HUD regulations to implement these three sections of HOTMA. In addition to amending the regulations governing HUD’s public housing and Section 8 programs, the HOTMA final rule revised the program regulations for several other HUD programs, including the Supportive Housing for the Elderly (Section 202) and Supportive Housing for Persons with Disabilities (Section 811) Capital Advance programs. HUD revised the regulations for these programs in the interest of aligning the HOTMA final rule’s requirements across programs.

Pursuant to the Cranston-Gonzalez National Affordable Housing Act of 1990, Public Law 86-372, Congress repealed the Section 202 Direct Loan program and created the Section 202 and Section 811 Capital Advance programs. However, there are projects still operating under Direct Loan program requirements, including the Section 202/8 and the Section 202/162 programs. Certain regulations applicable to the Direct Loan program and regulations specific to the 202/8 and 202/162 programs were revised by the HOTMA final rule but other regulations were inadvertently excluded. Accordingly, this final rule revises certain regulations applicable to the Direct Loan program (including those governing the 202/8 and 202/162 programs) to conform them with other Direct Loan program regulations as amended by the HOTMA final rule.

This final rule also makes technical corrections to replace outdated cross references in

these program regulations consistent with a final rule that took effect on November 18, 1996 (61 FR 54492), in which HUD removed 24 CFR part 813, and updates the list of protected classes applicable to affirmative marketing requirements for the Section 202/8 and Section 202/162 programs.

II. Changes Made in This Final Rule

The following is an overview of the changes made to 24 CFR part 891 in this final rule.

§ 891.510 Displacement, relocation, and real property acquisition

This final rule revises § 891.510(f)(1)(iii)(A)(2) by replacing the outdated cross reference to “24 CFR 813.107” with a cross reference to “24 CFR 5.628.”

§ 891.520 Definitions applicable to 202/8 projects

This final rule revises the definition of “Family (eligible family)” in § 891.520 by replacing the outdated cross reference to “part 813 of this chapter” with a cross reference to “24 CFR 5.403.”

§ 891.575 Leasing to eligible families

This final rule revises § 891.575(a)(2) by replacing the outdated cross reference to “part 813 of this chapter” with a cross reference to “24 CFR 5.653.”

§ 891.655 Definitions

This final rule revises the definitions of “annual income,” “family,” “tenant rent,” and “total tenant payment” in § 891.655 to be consistent with the definitions implemented by the HOTMA final rule for the Section 202 and Section 811 programs and to remove outdated cross references to “part 813 of this chapter”. Specifically, the HOTMA final rule revised the definitions of “annual income” in § 5.609 and “total tenant payment” in § 5.628. It also added the definition of “tenant rent” to § 891.105. This rule incorporates these revised definitions in § 891.655. For consistency with prior HUD rulemakings, this final rule also revises the definitions of “family,” “utility allowance,” and “utility reimbursement” in § 891.655 by replacing outdated cross references to “part 813 of this chapter”.

This final rule also removes the definition of “rent” in § 891.655, as the reference to § 891.505 is incorrect (“rent” is no longer defined in § 891.505). This revision is consistent with the HOTMA final rule, which updated definitions for the Section 202 and Section 811 program regulations in part 891.

§ 891.720 Leasing to eligible families

This final rule revises § 891.720(a)(3) to replace the outdated cross reference to “part 813 of this chapter” with a cross reference to “part 5, subpart F of this title”.

§ 891.740 Responsibilities of Borrower

This final rule revises the last sentence of § 891.740(a)(2) by removing the word “creed”, adding the parenthetical phrase “including actual or perceived sexual orientation and gender identity” following the term “sex,” and adding “disability” and “familial status,” to read: “The purpose of the plan and requirements is to achieve a condition in which eligible families of similar income levels in the same housing market have a like range of housing choices available to them regardless of their race, color, religion, sex (including actual or perceived sexual orientation and gender identity), disability, familial status, or national origin.” This language is consistent with existing civil rights authorities applicable to HUD programs and the HOTMA final rule.

§ 891.750 Selection and admission of tenants

The final rule revises 891.750 by replacing an outdated cross reference to “§ 813.102 of this chapter” with a cross reference to part 5, subpart F of this title, as modified by 24 CFR 891.505. These revisions are consistent with the HOTMA final rule.

Although the 202 Direct Loan program uses the term ‘handicapped,’ the term ‘disability’ is more commonly used and accepted today to refer to physical or mental impairments. For this reason, this rule uses the term ‘disabilities’ wherever possible. However, corresponding changes to HUD’s regulations are not feasible via this final rule, given the limited nature of the technical amendments being made. HUD anticipates future changes that will address this issue throughout

its regulations in title 24 of the Code of Federal Regulations.

Further, this final rule revises the last sentence in § 891.750(b)(3) by removing the word “creed” and adds the parenthetical phrase, “including actual or perceived sexual orientation and gender identity,” following the term “sex,” substitutes “disability” for “handicap” and adds “familial status.” This language is consistent with existing civil rights authorities applicable to HUD programs and the HOTMA final rule.

Finally, this final rule revises § 891.750(c) by replacing the existing paragraph (c) with revised text on regular reexaminations that aligns with the Section 202 and Section 811 program regulations as amended by the HOTMA final rule.¹

III. Justification for Final Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with HUD’s regulations on rulemaking at 24 CFR part 10. However, part 10 provides for exceptions to the general rule where HUD finds that public comment would be “impracticable, unnecessary or contrary to the public interest” (see 24 CFR 10.1).

HUD finds that good cause exists to publish this final rule for effect without first soliciting public comment. Section 102 of HOTMA amends the 1937 Act to revise the frequency of family income reviews and calculations of income in HUD’s public housing, Section 8 Moderate Rehabilitation, Section 8 Moderate Rehabilitation Single Room Occupancy (SRO), Section 8 Project-Based Rental Assistance (PBRA), 202/8, 202/162 Project Assistance Contract (202/162 PAC), Section 202/811 Capital Advance with Project Rental Assistance Contract (202/811 PRAC), Section 811 Project Rental Assistance Demonstration (811 PRA), Senior Preservation Rental Assistance Contracts (SPRAC), and non-insured 236 projects with Interest Reduction Payments programs. Section 104 of HOTMA amends the 1937 Act to set limits on the assets that families residing in public housing and families receiving assistance under Section 8

¹ See the HOTMA final rule’s revisions to § 891.610(g)(1), (2), and (3)(i), 88 FR 9669.

may own. These HOTMA changes impact the Section 202 Direct Loan program, including the Section 202/8 and 202/162 program. As explained in the Background section of this preamble, Congress repealed the Direct Loan program, but there are projects still operating under Direct Loan program requirements, including the Section 202/8 and the Section 202/162 programs. Certain regulations applicable to the Direct Loan program and regulations specific to the 202/8 and 202/162 programs were included in the HOTMA final rule but other regulations were inadvertently excluded. Because of the similarity in functional roles and responsibilities to the HCV program and Section 202 programs, HUD believes that the public comments submitted in response to HUD's HOTMA proposed rule published on September 17, 2019 (84 FR 48820), on these topics, and HUD's responses to public comments in HUD's HOTMA final rule, which applied part 5 regulations to Section 202 programs, provide HUD with a solid basis to make conforming changes to its Section Direct Loan program regulations. In this regard, the interests of the parties most affected by HUD's conforming changes—owners and program participants—are substantially identical to the parties impacted by the changes made by HUD's HOTMA rulemakings. Finally, the purpose of this final rule is to conform the Section 202 Direct Loan program regulations with Section 202 and 811 program regulations as amended by HUD's HOTMA final rule. Most of the HOTMA income changes impacting the Section 202 Direct Loan program were implemented by revisions to 24 CFR part 5 through the HOTMA final rule. The ability to use these part 5 changes in accordance with other interrelated HOTMA Section 102 and 104 requirements would be hindered without conforming changes to part 891.

The changes being made in this final rule are necessary also to update the list of protected classes applicable to affirmative marketing requirements for the Section 202/8 and Section 202/162 programs, aligning these regulations with current protected classes under the Fair Housing Act (42 U.S.C 3601 et seq.) as well as providing consistency across part 891. The affirmative marketing requirements in §§ 891.400 and 891.600 reflect current law by requiring that all similarly situated eligible households have a like range of housing choices available to

them regardless of “race, color, creed, religion, familial status, disability, sex, or national origin.” However, the affirmative marketing provision within § 891.740 lists only “race, color, creed, religion, sex, or national origin.” This language is not in alignment with current law. As such, this final rule updates the language to include all protected classes applicable to affirmative marketing requirements for the Section 202/162 program, consistent with requirements across part 891. Further, in the time since these regulations have last been updated, there has been clarification regarding the inclusivity of ‘sex’ as a federally protected class². Therefore, this final rule also makes changes that clarify what is meant by ‘sex’ regarding protected classes for affirmative marketing purposes.

As a result, this final rule makes conforming changes to HUD’s Section 202 Direct Loan program regulations. Soliciting public comment on this rule is unnecessary because public comment was sought as part of the rulemaking leading to publication of the HOTMA final rule. This final rule aligns Section 202 Direct Loan program regulations with the HOTMA final rule; and it revises and replaces outdated cross references, consistent with HUD’s prior rulemakings.

IV. Findings and Certifications

Regulatory Review – Executive Orders 12866, 13563, and 14094

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory

² “...it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Bostock v. Clayton County, Georgia, 590 U.S. ____ (2020), 140 S.Ct. 1731, 1742 (2020).

objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter referred to as the “Modernizing E.O.”) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things. In this final rule, HUD is making conforming changes to Section 202 Direct Loan program regulations to align them with HUD’s HOTMA final rule and to replace outdated cross references and terminology consistent with prior HUD rulemakings. These changes are technical in nature; HUD is not introducing any new regulatory changes or rationales that differ in substance from those in prior rulemakings. This rule was not subject to OMB review. This rule is not a “significant regulatory action” as defined in Section 3(f) of Executive Order 12866 and is not an economically significant regulatory action.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As in HUD’s HOTMA final rule, this final rule revises HUD’s Section 202 Direct Loan program regulations in a manner that will reduce burden or provide flexibility for Borrowers and assisted families, including by providing more specific events that trigger an interim reexamination of family income, whereas current regulations provide that families may request reexaminations at any time. Additionally, HUD is making conforming changes to Section 202 Direct Loan program regulations to align them with HUD’s HOTMA final rule and to replace outdated cross references and terminology consistent with prior HUD rulemakings. These amendments impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Environmental Impact

The final rule relates to establishment and review of income limits and exclusions with regard to eligibility for or calculation of HUD housing assistance or rental assistance and related external administrative or fiscal requirements and procedures that do not constitute a development decision that affects the physical condition of specific project areas or building sites. The final rule also updates provisions that set out fair housing or nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3) and (c)(6), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and Tribal Governments and the private sector. This rule does not impose any Federal mandates on any state, local, or Tribal Governments or the private sector within the meaning of the UMRA.

List of Subjects in 24 CFR Part 891

Aged, Grant programs — housing and community development, Individuals with disabilities, Loan programs — housing and community development, Low and moderate income

housing, Public assistance programs, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR part 891 as follows:

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

1. The authority for 24 CFR part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

§ 891.510 [Amended]

2. Amend § 891.510(f)(1)(iii)(A)(2) by removing “24 CFR 813.107” and adding in its place “24 CFR 5.628”.

§ 891.520 [Amended]

3. Amend the definition of “Family (eligible family)” in § 891.520 by removing “part 813 of this chapter” and adding in its place “24 CFR 5.403”.

§ 891.575 [Amended]

4. Amend § 891.575(a)(2) by removing “part 813 of this chapter” and adding in its place “24 CFR 5.653”.

§ 891.655 Definitions applicable to 202/162 projects.

5. Amend § 891.655 by:

a. Removing the definition of “rent”; and

b. Revising the definitions of “annual income,” “family (eligible family),” “tenant rent,” “total tenant payment,” “utility allowance,” and “utility reimbursement” to read as follows:

Annual income is defined in part 5, subpart F of this title. In the case of an individual residing in an intermediate care facility for individuals with a developmental disability that is assisted under Title XIX of the Social Security Act and subpart E of this part, the annual income of the individual shall exclude protected personal income as provided under that Act. For purposes of determining the total tenant payment, the income of such individuals shall be

imputed to be the amount that the family would receive if assisted under Title XVI of the Social Security Act.

* * * * *

Family (eligible family) means a family that includes a person with a disability (that meets the definition of a handicapped family in § 891.505) that meets the project occupancy requirements approved by HUD and, if the family occupies an assisted unit, meets the low-income requirements described in 24 CFR 5.603, as modified by the definition of “*annual income*” in this section.

* * * * *

Tenant rent equals total tenant payment less utility allowance, if any.

Total tenant payment means the monthly amount defined in, and determined in accordance with part 5, subpart F of this title.

Utility allowance is defined in part 5, subpart F of this title and is determined or approved by HUD.

Utility reimbursement is defined in part 5, subpart F of this title.

* * * * *

6. Amend § 891.720 by revising paragraph (a)(3) to read as follows:

§ 891.720 Leasing to eligible families.

(a) * * *

(3) Has not rejected any such applicant family except for reasons acceptable to HUD. If the Borrower is temporarily unable to lease all units or residential spaces to eligible families, one or more units or residential spaces may, with the prior approval of HUD, be leased to otherwise eligible families that do not meet the income requirements of part 5, subpart F of this title.

Failure on the part of the Borrower to comply with these requirements is a violation of the PAC and grounds for all available legal remedies, including an action for specific performance of the PAC, suspension or debarment from HUD programs, and reduction of the number of units (or in

the case of group homes, reduction of the number of residential spaces) under the PAC as set forth in paragraph (b) of this section.

* * * * *

7. Amend § 891.740 by revising paragraph (a)(2) to read as follows:

§ 891.740 Responsibilities of Borrower.

(a) * * *

(2) Marketing must be done in accordance with the HUD-approved affirmative fair housing marketing plan and all fair housing and equal opportunity requirements. The purpose of the plan and requirements is to achieve a condition in which eligible families of similar income levels in the same housing market have a like range of housing choices available to them regardless of their race, color, religion, sex (including actual or perceived sexual orientation and gender identity), disability, familial status, or national origin.

* * * * *

8. In § 891.750, revise the introductory text of paragraph (b) and paragraphs (b)(3), (c)(1), (2), and (3)(i) to read as follows:

§ 891.750 Selection and admission of tenants.

* * * * *

(b) *Determination of eligibility and selection of tenants.* The Borrower is responsible for determining whether applicants are eligible for admission and for the selection of families. To be eligible for admission, an applicant family must be a family that includes a person with a disability (that meets the definition of “handicapped family” in 24 CFR 891.505); meet any project occupancy requirements approved by HUD; meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B; and be a low-income family, as defined in part 5, subpart F of this title, as modified by 24 CFR 891.505. Under certain circumstances, HUD may permit the leasing of units (or residential space in a group home) to ineligible families under § 891.720.

* * * * *

(3) If the Borrower determines that an applicant is ineligible for admission or the Borrower is not selecting the applicant for other reasons, the Borrower will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has a right to request a meeting to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by the member of the Borrower's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights, including filing a complaint with HUD's Office of Fair Housing and Equal Opportunity, if the applicant believes the applicant is being discriminated against on the basis of race, color, religion, sex (including actual or perceived sexual orientation and gender identity), disability, familial status, or national origin.

* * * * *

(c) * * *

(1) *Regular reexaminations.* If the family occupies an assisted unit (or residential space in a group home), the Borrower must reexamine the income and composition of the family at least every 12 months. Upon verification of the information, the Borrower shall make appropriate adjustments in the total tenant payment in accordance with § 5.657 of this title and must adjust the rent. The Borrower must also request an appropriate adjustment to the project assistance payment. Further, the Borrower must determine whether the family's unit size is still appropriate and must carry out any unit transfer in accordance with HUD standards. At the time of reexamination, the Borrower must require the family to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B. For requirements regarding the signing and submitting of consent forms by families for obtaining wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 5, subpart B.

(2) *Interim reexamination.* If the family occupies an assisted unit (or residential space in a group home) the family must comply with the provisions in § 5.657 of this title regarding interim reporting of changes in income. If the Borrower receives information concerning a change in the family's income or other circumstances between regularly scheduled reexaminations, the Borrower must consult with the family and make any adjustments determined to be appropriate. See 24 CFR part 5, subpart B, for the requirements for the disclosure and verification of Social Security Number at interim reexaminations involving new household members. For requirements regarding the signing and submitting of consent forms by families for obtaining wage and claim information from State Wage Information Collection agencies, see 24 CFR part 5, subpart B. Any change in the family's income or other circumstances that result in an adjustment in the total tenant payment, tenant rent, or project assistance payment must be verified.

(3) * * *

(i) A family occupying an assisted unit (or residential space in a group home) shall remain eligible for project assistance payments until the total tenant payment equals or exceeds the gross rent (or a pro rata share of the gross rent in a group home). The termination of subsidy eligibility will not affect the family's other rights under its lease. Project assistance payments may be resumed if, as a result of changes in income, rent, or other relevant circumstances during the term of the PAC, the family meets the income eligibility requirements of § 5.657 of this title (as modified in § 891.105) and project assistance is available for the unit or residential space under the terms of the PAC. The family will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (b) of this section.

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Julia R. Gordon,
Assistant Secretary for Housing — FHA
Commissioner.

